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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments
FM Broadcast Stations
(Fredericksburg, Texas)

)
)
) MB Docket No. 05-112
) RM-11185
)
)

To: Office of the Secretary
Assistant Chief, Audio Division, Media Bureau

OPPOSITION OF KATHERINE PYEATT
TO COUNTERPROPOSAL

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SUMMARY

Previously, the labywrinthine trail from the Quanah rulemaking notice to the end result, while following some 18 steps across Oklahoma and Texas, at least purportedly had some nexus between each step. Under their Southern Strategy, the Joint Parties request severance and grant of a major portion of the counterproposal which never had any nexus tying back to the Quanah notice. Such a request on a nunc pro tunc basis, by its very terms and conditions, cannot possibly pass the "logical outgrowth" test under the Administrative Procedure Act.

In the case of the Fredericksburg petition, the proposed channel (265) bears no relationship the the Quanah channel (233). Both proposals are for relatively small powered FM facilities, i.e., a Class C3 facility at Fredericksburg and a Class A facility at Quanah. The distance between Quanah and Fredericksburg is approximately 275 miles. None of the court and agency decisions comes even close to establishing "logical outgrowth" under these circumstances. The same conclusion is the case for components of the Joint Parties' Southern Strategy in conflict with petitions for allotments at Goldthwaite, Texas (200 miles distant from Quanah), Evant, Texas (215 miles distant from Quanah), Harper, Texas (275 miles distant from Quanah), Shiner, Texas (368 miles distant from Quanah), Batesville, Texas (370 miles distant from Quanah) and Tilden, Texas (408 miles from Quanah). In all instances, the proposed channels are at least

three channels removed from the Quanah channel with the sole exception of Shiner, which is a first adjacent channel for which the distance (368 miles) precludes any possibility of a conflict.

The Joint Parties' seek credit on the basis that it would provide the first local outlet for self expression under Section 307(b) of the Communications Act, for three tiny communities located within the San Antonio and Austin, Texas, radio markets, ranked 32nd and 49th largest in the nation, respectively. In each instance, a long established major radio operator will continue to own and operate its megamillion dollar facility with even greater power and coverage throughout the market. It is irrational to believe that these major market stations will in fact serve as the "first local outlets" for these tiny communities within the meaning of the Act. As applied to this case, the Commission's Tuck policy under which such an irrational concept has been advanced is arbitrary, capricious and contrary to law.

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1. The Counterproposal ("JP Counterproposal") filed May 9, 2005 by Rawhide Radio, Inc., Capstar TX Limited Partnership, CCB Texas Licenses, L.P. and Clear Channel Broadcasting Licenses, Inc. ("Joint Parties") is without merit.¹

A.
Introduction

2. The Administrative Procedure Act requires that reasonable notice be given regarding rulemaking proposals, i.e., limited to matters that are a "logical outgrowth" of the rulemaking notice as defined in court and agency case law. At the time (in 2000) for filing counterproposals in conjunction with a rulemaking petition for an allotment to the community of Quanah, Texas, the Joint Parties submitted an 18-step counterproposal. With respect to what has become the Northern Strategy of the counterproposal that basicly deals with the Dallas-Fort Worth area, the Commission upheld an element of the

¹ The JP Counterproposal has not yet been put on public notice calling for responsive comments. This Opposition is filed now due to travel commitments of counsel for Ms. Pyeatt in the near future.

Joint Parties' counterproposal that resulted in denial of a conflicting allotment at Benjamin, Texas -- a case that currently is under review in the Court of Appeals. Charles Crawford v. FCC, No. 04-1031 (D.C.Cir.).²

3. In the instant Fredericksburg allotment proceeding based on Ms. Pyeatt's petition filed in November 2004, placed on public notice in March 2005, the Joint Parties have chosen to change its Quanah counterproposal to eliminate Steps One through Ten comprizing the Northern Strategy and rely exclusively on Steps Eleven through Eighteen comprizing the Southern Strategy that basicaly deals with the Austin and San Antonio areas. This breaks the chain of former ties to the Quanah petition. Nonetheless, the Joint Parties attempt to rely on the abandoned five year old Quanah notice for retroactive status to preempt Ms. Pyeatt's Fredericksburg petition. We don't think the Joint Parties are permitted to do this, but if they are, the Joint Parties must bear the burden of persuasion that it is reasonable to hold that citizens interested in securing a relatively low powered class C-3 FM frequency to serve Fredericksburg, Texas, were on notice of a potential conflict arising from a rulemaking petition for an even lower-powered Class A FM facility on an entirely different channel to serve a community located some 275 miles away.

² Also on review in that court appeal is Commission denial of an allotment to Mason, Texas, as conflicting with a component of the Southern Strategy in the Joint Parties' counterproposal, discussed infra.

B.

Steps one to ten from the,
Quanah rulemaking petition to
Ardmore-Healdton, Oklahoma
(the Northern Strategy)

4. The Quanah rulemaking proceeding was begun with the filing of a petition to allot channel 233C2 at Quanah, Texas, located near the Texas Panhandle in the northwestern part of the state. The Commission's notice of proposed rulemaking identified Marie Drischel residing in Big Creek, Mississippi as the party who filed the petition to commence the rulemaking proceeding.

5. The Quanah petition did not mention -- and perforce the FCC public notice did not mention -- any other community or the fact that for a long time previously, dating back to 1998, a counterproposal had been conceived, developed and prepared -- and was going to be filed on the "comment" date to which further counterproposals would not be entertained -- by the Joint Parties, major group broadcasters, having interests in many hundreds of radio stations including numerous stations throughout Texas.

6. All Ms. Pyeatt or other members of the general public knew from the agency's rulemaking public notice was that Ms. Dreschel proposed to allot and file for a new radio station in the remote community of Quanah, Texas on the channel that she had specified. The steps in the "labywrinthine trail," a phrase taken from a landmark court decision regarding "logical

outgrowth" of rulemaking notices under the APA³, leading to results desired by the Joint Parties are these:

(a) Step one: The trail begins with a proposal to move existing FM channel 248C2 at Durant, Oklahoma, to a small town named Keller, Texas, imbedded in the heart of the Dallas-Fort Worth metropolitan area, the nation's sixth largest radio market, for which an upgrade to a fully powered channel 248C was proposed. Joint Parties' Counterproposal in Docket 00-148 at 5-13.

(b) Step two: In order to do that, a radio station in Archer City, Texas, would have to change from channel 248C1 to channel 230C1. Counterproposal in Docket 00-148 at 13.

(c) Step three: In order for the Archer City station to do that, a radio station in Seymour, Texas would relinquish its authorized upgrade from a Class A channel to channel 230C2 and change to channel 222C2. Counterproposal in Docket 00-148 at 14.

(d) Steps four, five and six: In order for the Seymour station to do that, three authorized, but vacant allotments would be changed, one in Seymour, one in Wellington, Texas, and one in Knox City, Texas. Counterproposal in Docket 00-148 at 15.

(e) Step seven: In order for the Archer City reallocation to happen (step two), a radio station in Lawton, Oklahoma, would change from channel 231C2 to channel 232C2. Counterproposal in Docket 00-148 at 15.

³ Weyerhaeuser v. Costle, 590 F.2d 1011 (D.C.Cir. 1978).

(f) Step eight: In order for the Lawton reallocation to happen, a radio station in Elk City, Oklahoma, would change from channel 232C3 to 233C3, creating a conflict with Ms. Dreschel's petition to allot channel 233 to Quanah, down the road away from Elk City. Counterproposal in Docket 00-148 at 15-16.

(g) Step nine: Return again to step two, the Archer City reallocation. For that to happen, in addition to the steps already mentioned, a radio station in Healdton, Oklahoma, would move and change its community of license to Purcell, Oklahoma. Counterproposal in Docket 00-148 at 16-18.

(h) Step nine brought the labyrinthine trail to the brink of a precipice overlooking a regulatory Grand Canyon. Moving the radio station out of Healdton would leave the community without a local outlet, an FCC no-no.

(i) Enter step ten: A radio station in Ardmore, Oklahoma, would give up its license in that larger community and adopt Healdton as its community of license, a highly unusual 307(b) maneuver which the Joint Parties refer to as "the Ardmore/Healdton" proposal. Counterproposal in Docket 00-148 at 18-19.

C.
Steps eleven to eighteen
from Waco, Texas to Flatonia, Texas
(the Southern Strategy)

7. We now reach the point where the Joint Parties have chosen to abandon the foregoing trail as set forth in the Counterproposal filed in the Quanah proceeding (Docket 00-148). We start a new trail with no nexus to the Quanah petition

whatsoever. The follower of this trail, having set its compass starting at Quanah and working through Steps One through Ten, must now have the extra sensory perception to devine that there is a disconnected chain of allotments that might adversely affect interested citizens whose only clue is the Quanah public notice:

(a) Step eleven: The new trail begins with a radio station in Waco, Texas, that would downgrade from channel 248C to channel 247C1 and change its community of license to Lakeway, Texas, a small community near Austin, Texas. In the process, the station, owned by Joint Parties' Capstar TX, would upgrade its commercial location from Waco, the 193rd radio market, to Austin, the 49th radio market. JP Counterproposal in the instant docket at 4-9.

(b) Step twelve: For the Waco/Lakeway changes to occur, a San Antonio radio station would downgrade from channel 247C to 245C1. JP Counterproposal in the instant docket at 9-10. This step conflicts with a petition for allotment of channel 245C3 at Tilden, Texas, filed four years ago in May 2001, and was dismissed in MM Docket No. 01-153; Application for Review pending. The Tilden channel (245) bears no relationship to the Quanah channel (233) and Tilden is located more than 400 miles from Quanah.

(c) Step thirteen: A radio station in Georgetown, Texas, proposes to downgrade from channel 244C1 to 243C2 and change the community of license to Lago Vista, Texas, another small community near Austin, Texas. This would improve the

commercial position of the station, owned by the Joint Parties' Clear Channel Broadcast Licenses, Inc., as a second move-in to the Austin radio market. JP Counterproposal in the instant docket at 10-15. This step conflicts with a petition for allotment of channel 243A at Evant, Texas filed four years ago in June 2001, and was dismissed in MM Docket No. 01-188; Application for Review pending. The Evant channel (243) bears no relationship to the Quanah channel (233). Evant is located approximately 215 miles from Quanah.

(d) Step fourteen: For the Waco/Lakeway/Georgetown changes to occur, channel 256A would have to be substituted for channel 243A at Ingram, Texas, all in the Austin, Texas area. JP Counterproposal in the instant docket at 15-16. This step conflicts with a petition for allotment of channel 256A at Harper, Texas filed four years ago in May 2001, and was dismissed by Letter of John A. Karousos, dated March 27, 2003; Application for Review pending. The Harper channel (256) bears no relationship to the Quanah channel (233). Harper is located approximately 275 miles from Quanah. This step also conflicts with the petition of Ms. Pyeatt in the current proceeding for allotment of channel 265C3 at Fredericksburg, Texas. This channel (265) bears no relationship to the Quanah channel (233). Fredericksburg, Texas, is located located approximately 275 miles from Quanah.

(e) Step fifteen: Also for the Waco/Lakeway/Georgetown changes to occur, a radio station in Llano, Texas, would move its

transmitter location and change from channel 242A to channel 297A. JP Counterproposal in the instant docket at 16-17. This step conflicts with a petition for allotment of channel 297A at Goldthwaite, Texas, filed four years ago in May 2001, and was dismissed in MM Docket 01-154; Application for Review pending. The Goldthwaite channel (242) bears no relationship to the Quanah channel (233). Goldthwaite is located approximately 200 miles from Quanah.

(f) Step sixteen: In order for the Llano reallocation to happen, a radio station in Nolanville, Texas, would change from channel 297A to channel 249A. JP Counterproposal in the instant docket at 17.

(g) Step seventeen: In order for the Nolanville station's channel change to happen, a radio station in McQueeney, Texas, would change its transmitter site and relocate from McQueeney to Converse, Texas. This was another precipice overlooking the regulatory grand canyon of an FCC no-no removing the only local outlet for McQueeney, a community located outside any metropolitan area. The choice, thus, was one that a follower of the trail would not have anticipated as a prospective public interest proposal, i.e., removing the only local outlet in favor of awarding -- to one of the Joint Parties who owns the McQueeney station -- still another high powered FM station in the San Antonio radio market, the nation's 32nd largest. JP Counterproposal in the instant docket at 18-23.

(h) Step seventeen above conflicts with a petition to allot

249C3 at Mason, Texas and a petition to allot channel 250A at Batesville, Texas. JP Counterproposal in the instant docket at 18; the Batesville petition is still pending before the Commission, Id.; the Mason petition was dismissed and is currently pending before the court in Charles Crawford v. FCC, supra. Neither channel (249 and 250) bears any relationship to the Quanah channel (233). Mason is located some 235 miles from Quanah; Batesville is located approximately 370 miles from Quanah.

(i) Step eighteen is an allotment of channel 232A to Flatonia, Texas. JP Counterproposal in the instant docket at 23-24. This step conflicts with a petition to allot channel 232A at Shiner, Texas, filed more than four years ago in April 2001, dismissed in MM Docket No. 01-105, Application for Review pending. While the channel (232) is adjacent to the Quanah channel (233), Shiner is located 368 miles from Quanah, a distance that is out of any conflict range or reasonable notice to a citizen having an interest in the Shiner allotment that the Quanah allotment might pose a problem.

D.

With all ties to the Quanah rulemaking petition severed, the Southern Strategy cannot be deemed a "logical outgrowth" of that petition

8. The Administrative Procedure Act requires the Commission to publish in the Federal Register notice of a proposed rule in order to allow interested persons to file comments reflecting their interests. 5 U.S.C. §553(b)(3). The final rule must be a logical outgrowth of the proposed rule. Unless persons are

sufficiently alerted to know whether their interests are at stake, the public notice is unlawful. Weyerhaeuser Company v. Costle, supra); Owensboro on the Air v. United States, 262 F.2d 702 (D.C.Cir. 1958) (public notice upheld as meeting the "logical outgrowth test" in TV allotment proceeding involving a distance of 95 miles to a neighboring market); and agency common-law rulings Pinewood, South Carolina, 5 FCC Rcd 7609 (1990) (adequate notice to the public upheld in FM proceeding involving a distance of 17 miles); Medford and Grants Pass, Oregon, 45 RR2d 359 (1979) (adequate notice to the public upheld in TV proceeding involving distance of 27 miles); Pensacola, Florida, 62 RR2d 535 (MM Bur. 1987) (adequate notice to the public upheld in an FM proceeding involving distance of less than 10 miles); Toccoa, Sugar Hill, and Lawrenceville, Georgia, DA 01-2784 (MM Bur. 2001) (the "logical outgrowth test" was not satisfied in an FM proceeding involving a distance of 13 miles).

9. There is no way -- legally or rationally -- that the Commission's public notice of the Quanah allotment rulemaking proceeding can be deemed to apprise the public of alternative allotments across the State of Texas and much of the State of Oklahoma affecting either the Northern Strategy, i.e., Durant, Oklahoma, Keller, Texas, Archer City, Texas, Seymour, Texas, Wellington, Texas, Knox City, Texas, Lawton, Oklahoma, Elk City, Oklahoma, Healdton, Oklahoma, Ardmore, Oklahoma, or the Southern Strategy, Waco, Texas, Lakeway, Texas, San Antonio, Texas, Georgetown, Texas, Llano, Texas, Nolanville, Texas, McQueeney,

Texas, Converse, Texas, Ingram, Texas, and Flatonia, Texas, or the combination of the two.

10. The spacings between Quanah and Goldthwaite (200) miles, Evant (215 miles), Mason (235 miles), Harper (275 miles), Fredericksburg (275 miles), Batesville (370 miles), Shiner (368 miles) and Tilden (408 miles) are demonstrated in the map attached as Exhibit 1. They dwarf the spacings supporting a finding of "logical outgrowth" in the FM allotment holdings in Pinewood (17 miles) and Pensacola (ten miles or less). In Taccoa, the Bureau did not find a "logical outgrowth" even though the relevant communities were within 13 miles of each other. In allotment proceedings involving television channels and markets, where distances are likely to be greater than in FM, "logical outgrowth" was found in Owensboro involving channel changes in markets 95 miles apart and in Medford and Grants Pass involving channel changes in communities 27 miles apart.

11. For the benefit of the Commission and its staff residing in the local area, if an allotment petition for an FM station in Washington, D.C. is exposed to ABA-sanctioned notice of a potential for conflicting petitions as far away as 400 miles, the exposure would be measured by an arc starting in the vicinity of Boston, Massachusetts, thence to Albany, New York, thence to Cleveland, Ohio, thence to Lexington, Kentucky, thence to Charlotte, North Carolina, thence to Charleston, South Carolina.

12. This is much of the entire eastern United States.

Section 307(b) principles in FM allotment proceedings are vastly more refined than that and parties who file and prosecute the rulemaking petitions essential to the implementation of Section 307(b) are entitled to commensurate notice protection under the Administrative Procedure Act. When that is done, based on the agency's history of common law rulings with respect to "logical outgrowth" in allotment rulemaking proceedings, the spacings at issue here do not even come close to invoking APA sanctioned notice under the "logical outgrowth" test.

E.

Allotment cases reflecting reasonable application of the "logical outgrowth" requirement do not support approval of the Southern Strategy

13. The Joint Parties original counterproposal has been denied by the Commission and the Joint Parties have pending an Application for Review of that action. In its Application for Review (JP Application), the Joint Parties cited certain allotment case which demonstrate reasonable application of the "logical outgrowth" requirement including institution of fresh rulemaking proceedings for counterproposals where appropriate. None of these cases supports the Joint Parties, reliance on Steps Eleven through Eighteen sans any tie to the Quanah rulemaking notice or accords them nunc pro tunc protection under that notice.

(a) In Noblesville, Indianapolis and Fishers, Indiana, 18 FCC Rcd 11039 (Med.Bur. 2003), JP Application at 7, the petitioning parties sought to modify the initial rulemaking proposal while it was pending and the Commission declined to do

so; rather, it issued a new notice of proposed rulemaking "to insure that the public will have an opportunity to participate fully" in commenting on the modified proposal. The three communities were within 30 miles of each other.

(b) In Saratoga, Wyoming, et al, 15 FCC Rcd 10358 (MM Bur. 2000), JP Application at 7, the Commission noted that with respect to three interrelated allotment proceedings the same parties participated in the proceedings and accordingly had actual notice of actions being taken. After such actions had been taken, there remained an unresolved counterproposal which the Commission determined "will be treated as a new petition for rulemaking in a separate proceeding," hence calling for public comment. The communities that were involved in the initial rulemaking, Saratoga and Green River, Wyoming, were approximately 110 miles apart; the subject counterproposal, put out as a fresh allotment proceeding, related to Big Piney and La Barge, Wyoming, within 20 miles of each other.

(c) In Alva, Oklahoma, et al, 11 FCC Rcd 20915 (MM Bur. 1996), JP Application at 8, Party A filed a petition to allot a channel to Community A (Deerfield, Missouri), Party B filed a counterproposal proposing a conflicting allotment to Community B (Bartlesville, Oklahoma), Party A did not pursue its petition in the proceeding, Party B did, and the Commission granted the counterproposal of Party B. What is new or noteworthy here about that? Bartlesville and Deerfield are estimated to be about 80-100 miles apart.

(d) In Oakdale and Campti, Louisiana, 7 FCC Rcd 1033 (MM Bur. 1992), JP Application at 8, a station seeking to upgrade its FM facility lost to a competing allotment to establish a first local service; however, the Commission could and did place its petition in a separate rulemaking docket containing another allotment which did not conflict with the upgrade; thus, resolving the allotment situation for all three parties before it. In the separate docket, as in the initial docket, there was notice and opportunity for the public to comment. The upgraded station's community, Oakdale, was located some 80 miles from Campti, Louisiana (the conflicting proposal) and Coushatta, Louisiana (the non-conflicting proposal); the latter two communities were a few miles apart.

(e) In Kingston, Tennessee, et al, 2 FCC Rcd 3589 (MM Bur. 1987), JP Application at 7, the initial petitioner withdrew, a counterproposal was unacceptable and the proceeding was terminated. One of the parties attempted to file a new petition in the same proceeding; instead, the Commission established a new docket for consideration of that petition, i.e. with public notice and opportunity to comment. The contending communities were Kingston, Tennessee and Somerset, Kentucky, approximately 75 miles apart.

(f) In Cazenovia, New York, et al, 2 FCC Rcd 1169 (MM Bur. 1987), the main proceeding involved various proposals to deal with up-state New York upgrades and allotments. A counterproposal regarding Vermont allotments having no conflict

with the main proceeding was accepted by the Commission as a separate petition for rulemaking, with public notice and opportunity to comment.

(g) In Milford, Utah, DA 04-1651 (Media Bur. released June 10, 2004), JP Application at 3, 6, 7, a petition to allot a channel to Milford did not advance for want of comments by the petitioner; a counterproposal was filed for Enterprise, Utah, which was found to be defective on a number of grounds. Two petitions, competitive with each other to allot a channel to Lake Havasu City, Arizona, or Pahrump, Nevada Nevada, were also in conflict with the Enterprise counterproposal, and were put on public notice for consideration with the Lake Havasu City and Pahrump counterproposals. Upon dismissal of the defective Enterprise counterproposal, the FCC issued a fresh notice of proposed rulemaking for the remaining conflicted proposals for allotment to Lake Havasu City or Pahrump. These four communities form a rough triangle whose sides are approximately 100 miles long.

14. To be sure, the Commission and its staff have room for reasonable flexibility within the "logical outgrowth" framework to adapt their processes as reflected in these cases in order to resolve allotment issues that arise in the day-to-day work of the agency. However, the Joint Parties are not seeking such reasonable operational flexibility. With no supporting case precedent, the Joint Parties seek unique retroactive nunc pro tunc relief from the Commission, at the expense of parties whose

legitimate intervening rights would be trampled on, because their enormous spectrum overhaul under the aegis of an obscure singleton rulemaking petition came apart.

F.

The Joint Parties' claim for credit based on "population gain" from the Southern Strategy is without merit

15. In the instant proceeding, the Joint Parties seek credit for an overall gain in FM service to more than a million people. JP Counterproposal at 25, Engineering Statement at 10. There is no suggestion that any of these people reside in a "white area" without any reception service or a "gray" area with only a single reception service. In all likelihood, the vast majority of these people reside in the San Antonio and Austin radio markets ranked 32nd and 49th largest in the nation. There are approximately 46 radio stations in the San Antonio radio market (Exhibit 2) and approximately 45 radio stations in the Austin radio market (Exhibit 3), offering an enormous range of radio services with multiple stations providing the more popular services. News and other information programming can be heard 24-7 across the radio dial. If the million people receiving an incremental additional signal already have such a multiplicity of signals, how relevant is this statistic except to show that major markets have a lot of people in them than deserving rural communities such as Goldthwaite, Evant, Mason, Harper, Fredericksburg, Batesville, Shiner and Tilden. It should be given no weight in consideration of the JP Counterproposal.

G.

As applied to "first local outlet" claims
regarding the Southern Strategy, the "Tuck"
policy is arbitrary and capricious,
contrary to law

16. The Joint Parties want the Commission to believe that a Class C-1 allotment in the Austin, Texas market, the nation's 49th largest, worth megamillions of dollars, after all these years of ownership and operation by Joint Parties' Capstar TX Limited Partnership, will become (and is to be credited under Section 307(b) as) the local outlet for the tiny community of Lakeway, population 8,002, imbedded within the huge metro service area of a Class C-1 facility. JP Counterproposal at 4-9, 24-25,

17. The Joint Parties also want the Commission to believe that a Class C-2 allotment in the Austin, Texas market, worth megamillions of dollars, after all these years of ownership and operation by Joint Parties' Clear Channel Broadcast Licenses, Inc., will become (and is to be credited under Section 307(b) as) the local outlet for the tiny community of Lago Vista, Texas, population 4,507, imbedded in the major metro service area of a Class C-2 facility. JP Counterproposal at 10-15, 24-25.

18. And, the Joint Parties want the Commission to believe that a Class C-1 allotment in the San Antonio, Texas market, the nation's 32nd largest, worth megamillions of dollars, after all these years of ownership and operation by Joint Parties' Rawhide Radio, L.L.C., will become (and is to be credited under Section 307(b) as) the local outlet for the tiny community of Converse, Texas, population 11,508, imbedded in the huge metro service area

of a Class C-1 facility. JP Counterproposal at 18-23, 24-25.

19. How is it that parties can present such a scenario to the agency and, instead of being ushered out the door, they have come to expect that the FCC will accept it, hook, line and sinker? The answer lies in the agency's Tuck policy.

20. The Tuck policy reminds us of a protocol of the State Department. During the 1800's and early early 1900's when our nation was actively acquiring interests in islands and territories in competition with nations such as England and Spain, statutes and other documents would at times provide that a given island or territory was "appertaining" to the United States. E.g., 48 U.S.C. §1411 regarding Navassa Island in the Caribbean near Cuba shortly prior to the Spanish-American War. The State Department explains the meaning of "appertaining" in this way: "The use of the word 'appertain' is deft, since it carries no exact meaning and lends itself readily to circumstances and the wishes of those using it." Sovereignty Study of State Department, 1931-1932, at 145-146 (copy attached as Exhibit 4 for handy reference). So, too, here, with respect to the Commission's Tuck policy.

21. The Tuck policy is a menu of wildly subjective criteria: (a) The extent to which the community residents work in the larger metropolitan area; (b) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (c) whether community leaders and residents perceive the specified community as being an integral